No. 15-145

IN THE

Supreme Court of the United States

HUSKY INTERNATIONAL ELECTRONICS, INC.

Petitioner,

v.

DANIEL LEE RITZ. JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

When Congress added "actual fraud" as a ground for barring discharge, it used that term according to its settled meaning. Actual fraud refers to fraudulent acts that are committed intentionally Centuries-old historical usage establishes that actual fraud includes a transferee's receipt of property through a conveyance that he knows is intended to defraud creditors. Congress codified that understanding in 1978. Thus, when a debtor knowingly obtains property through a fraudulent transfer, he commits actual fraud himself, and § 523(a)(2)(A) bars discharge of the resulting debt.

Respondent recognizes the need to give substantive meaning to Congress's 1978 amendment. To do so, he advances the novel theory—not adopted even by the Fifth Circuit below—that Congress added the words "or actual fraud" to narrow the preceding terms "false pretenses" and "false representation." He contends that "actual fraud" is an adjective referring to *mens rea*, and that "or" introduces a modifier to whatever comes before it. Respondent thus reads "false pretenses, a false representation, or actual fraud" to mean "intentional false pretenses or an intentional false representation."

That is a crime against grammar. The disjunctive "or" expands upon the noun phrases that precede it; it does not limit or modify them. Moreover, "actual fraud" is itself a noun phrase, not an adjective. It describes both conduct (fraud) and how it is carried out (intentionally). Thus, consistent with basic grammar and common-law usage, Congress added "or actual fraud" to expand the fraud discharge bar and

to ensure that it covers all forms of intentional fraud, not just those involving misrepresentations.

ARGUMENT

I. CONGRESS'S 1978 AMENDMENT ADDED "ACTUAL FRAUD" AS A GROUND FOR BARRING DISCHARGE

Congress amended § 523(a)(2)(A) in 1978 to add "actual fraud" as an additional ground for discharge. Respondent nevertheless insists that the words "or actual fraud" *narrowed* the discharge bar. But no one would use "or" followed by a noun phrase to modify the two preceding noun phrases—that is, to describe the manner in which a debtor commits false pretenses or makes a false representation.

A. Congress Used The Word "Or" To Expand The Scope Of § 523(a)(2)(A)

According to Respondent, Congress used "or" to limit the terms before it. That usage of "or" is not just "ill-advised." Resp.Br.19. It is illiterate.

1. This Court has recognized repeatedly that "or" is a disjunctive that typically connects words with "separate meanings" to *expand* a statute's scope; it is not used to "modify" one word with another. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Reiter construed a statute allowing private antitrust plaintiffs to sue for injuries to "business or property." *Id.* at 335. Consumers alleged that they paid higher prices as a result of manufacturers' anti-competitive conduct. *Id.* Asserting that "business" modified "property," the manufacturers claimed that "business or property" meant "'business activity or property related to one's business,'" such that only

commercial injuries were actionable. *Id.* at 338. They further argued that, if "property" were not limited to business activity, "business" would become superfluous because *any* harm to business is pecuniary and, thus, an injury to property. *Id.*

Reiter rejected that "strained construction." *Id.* "Congress's use of the word 'or,'" the Court explained, "makes plain that 'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'" *Id.* at 339. *Reiter* accordingly refused to "ignore the disjunctive 'or,'" "rob the term 'property' of its independent and ordinary significance," and "convert the noun 'business' into an adjective." *Id.* at 338-39. Other decisions reflect similar reasoning. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (rejecting statutory construction that "effectively reads 'or' to mean 'including'"); *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 224-25 (2008) (last item in disjunctive phrase not modified by preceding items); *Garcia v. United States*, 469 U.S. 70, 73 (1984) (Congress's "use of a disjunctive" means that each term must be given its "ordinary" meaning).

2. Likewise, § 523(a)(2)(A) uses the word "or" according to its ordinary meaning, as a disjunctive. Congress's use of "or" "makes plain that ['actual fraud'] was not intended to modify ['false pretenses' and 'false representation']." *Reiter*, 442 U.S. at 339. And each term that "or" connects—false pretenses, false representation, actual fraud—has its own settled meaning that must be given effect. *See* Pet.Br.36-38.

Indeed, the House and Senate reports explain that Congress "added" the words "actual fraud" as a *new* "ground[] for exception from discharge." S. Rep. No. 95-989, at 78 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5784, 5864; H.R. Rep. No. 95-595, at 384 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320. This closed a gap in prior law: Courts and members of Congress recognized that, before the 1978 addition of "actual fraud," § 523(a)(2)(A)'s predecessor did not cover debts arising from the "many *other* frauds ... besides false pretenses and false representations."[1] 36 Cong. Rec. H1375 (daily ed. Jan. 28, 1903) (statement of Rep. Mann) (emphasis added); *see, e.g.*, *Zimmern v. Blount*, 238 F. 740, 744-45 (5th Cir. 1917) (observing that "[a] fraud may be committed in ways other than by the making of false representations," but that "false pretenses" and "false representations" were "the only kind[s] of fraud" covered by § 523(a)(2)(A)'s predecessor); *Drake v. Vernon*, 128 N.W. 317, 319 (S.D. 1910) (noting that § 523(a)(2)(A)'s predecessor reached "[o]nly" those frauds "connected with the obtaining of property by 'false pretenses or false representations'"). By adding the words "or actual fraud," Congress closed this gap and ensured that all debts arising from intentionally

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[1] Respondent incorrectly claims that "the 1978 Act's sponsor explained ... [that] section 523(a)(2)(A) was not designed to 'close' some unidentified 'gap' in the long-standing fraud exception." Resp.Br.28. No member of Congress said any such thing, and the House and Senate Reports refute it. *See* S. Rep. No. 95-989 at 78; H.R. Rep. No. 95-595 at 384; *see also* Resp.Br.28 n.3 (incorrectly attributing statement by Rep. Jenkins to Rep. Mann).

fraudulent conduct would be nondischargeable. *See* Pet.Br.36-38.

B. Actual Fraud Refers To Conduct And The Manner In Which It Is Committed—Not Merely A Mental State

Not only is "or" a term of expansion, but "actual fraud" is also not an adjective. Like "false pretenses" and "false representation," it is a noun phrase: The noun "fraud" refers to the perpetrator's acts (including participation in a fraudulent conveyance); the adjective "actual" refers to his mindset (i.e., whether the fraud was intentional).

1. For nearly 500 years, courts have used "actual fraud" to refer to intentionally fraudulent conduct, including a party's knowing participation in a conveyance intended to defraud creditors. *See* Pet.Br.20-32. Congress used "actual fraud" according to this settled meaning. Indeed, as Respondent recognizes, Congress derived the words "actual fraud" from *Neal v. Clark*, 95 U.S. 704 (1877). Resp.Br.29. And *Neal* used the phrase to describe a particular type of conduct: Knowing participation in a deliberately fraudulent conveyance—i.e., an act (participation in a conveyance) perpetrated with intent (to cheat creditors). *See* 95 U.S. at 707

Section 523(a)(2)(A)'s grammatical structure confirms that Congress used "actual fraud" in this manner, not as an adjective. Section 523(a)(2)(A) sets forth a series of noun phrases that refer to particular forms of "conduct." Resp.Br.25. The fundamental rule of parallelism dictates that Congress used "actual fraud" to "serve the same grammatical function in the sentence." THE CHICAGO MANUAL OF

STYLE § 5.212, at 259 (16th ed. 2010). Moreover, other sections of the Code confirm that Congress knew how to specify a particular *mens rea* when it wanted to. *See, e.g.*, 11 U.S.C. § 522(q)(1)(B)(iv) (debts arising from "*intentional* tort[s]" and "*willful* or *reckless* misconduct" (emphasis added)); *id.* § 526(c)(2)(B) (addressing "*intentional* or *negligent* failure to file [documents]" (emphasis added)). If Congress had wanted to add a *mens rea* to § 523(a)(2)(A), it would have said "intentional false pretenses or an intentional false representation." By instead referring to "actual fraud," Congress specified an additional form of conduct for which discharge was barred.

Indeed, *Field v. Mans*, 516 U.S. 59 (1995), on which Respondent relies extensively, undermines his interpretation of actual fraud. *Field* determined the dischargeability of a debt for particular "*conduct*"—a misrepresentation—by considering the elements of "actual fraud," as understood by the common law in 1978. *Id.* at 70 & n.9 (emphasis added).[2] That is, it treated "actual fraud" as a form of conduct and a distinct ground for discharge—not as a *mens rea* modifying the rest of § 523(a)(2)(A).

2. Respondent's efforts to transform "actual fraud" from a noun phrase referring to conduct into an adjective describing the manner in which conduct is carried out are unavailing.

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[2] Respondent's other authorities likewise describe actual fraud as conduct in which someone engages rather than merely a mindset. Resp.Br.29-30 & n.4. Even Respondent cannot avoid that usage. Resp.Br.29 ("[A] false representation with intent to injure qualifies as 'actual fraud.'").

First, Respondent claims that *Neal* used the phrase "actual fraud" as shorthand for *mens rea*, and without reference to the kind of conduct subject to the discharge bar. But by Respondent's own account, *Neal* was a fraudulent-conveyance case that used "the term 'actual fraud' to distinguish conveyances 'involving moral turpitude or intentional wrong' from those involving 'implied fraud, or fraud in law.'" Resp.Br.46-47 (quoting *Neal*, 95 U.S. at 709). *Neal* drew that line to delineate which conduct—in particular, which types of participation in *fraudulent conveyances*—fell within the discharge bar and which did not. *See* 95 U.S. at 707-09. Of course, the Court would have had no reason to draw that line if fraudulent conveyances were categorically excluded from the discharge bar. Thus, in adding "actual fraud" to codify *Neal*, Congress codified the same line that this Court drew: The discharge bar applies to intentional fraud (including knowing participation in a fraudulent transfer), but not to constructive fraud (such as innocent participation).

Second, Respondent is likewise wrong that other cases discussing actual fraud merely "describe an intent element." Resp.Br.49. For example, *Smith v. Wilder* explained that conveyances that hinder creditor rights are a form of "fraud." 120 So. 2d 871, 882 (Ala. 1960). *Bean v. Smith* held that those who participate in a conveyance designed to hinder creditors "are parties to a meditated fraud" and are themselves liable for "actual fraud." 2 F. Cas. 1143, 1149, 1159 (C.C.D.R.I. 1821). *Sands v. Codwise* described fraudulent conveyances as "a palpable fraud" that, when "made ... to cheat creditors," constitutes "actual fraud." 4 Johns. 536, 594-96, 599

(N.Y. Sup. Ct. 1808). *See also* Pet.Br.24-29. And the knowing recipient of the transfer also commits actual fraud. *See* Pet.Br.30-32. Thus, in *Twyne's Case*, the defendant was convicted of fraud for receiving property through a transfer that he knew was designed to hinder creditors. 3 Coke Rep. 80b, 83b, 76 Eng. Rep. 809, 823 (K.B. 1601).

Finally, interpreting actual fraud to mean intentional fraud does not render § 523(a)(2)(A) "boundless." Resp.Br.36. Rather, as *Field* explains, the term "actual fraud" should be understood by reference to the recognized forms of common-law fraud in 1978. 516 U.S. at 69. That includes knowing participation in deliberate fraudulent-transfer schemes. Pet.Br.24-32.[3]

C. Respondent's Other Attempts To Defend His Distorted Construction Fail

Respondent advances a series of other unavailing arguments in an attempt to legitimize his ungrammatical reading of § 523(a)(2)(A).

1. Section 523(a)(2)(A)'s predecessor did not already cover the universe of fraud

Respondent claims that "actual fraud" must have narrowed the scope of the discharge bar because

[3] Respondent's *amici* suggest that treating intentional fraudulent transfers as actual fraud sweeps in conduct with a lesser *mens rea* than other fraud because intent may be established through circumstantial evidence. Brunstad.Am.Br.13-14; NACBT.Am.Br.5. But circumstantial evidence is *always* sufficient to prove intent to defraud, regardless of the particular form of fraud. 37 Am. Jur. 2d Fraud & Deceit §§ 483, 489 (2016).

§ 523(a)(2)(A)'s predecessor, which barred debts arising from false pretenses and false representations, already covered the universe of fraud. But as Petitioner has explained, the common law recognized numerous forms of fraud—some of which did not entail a misrepresentation, and were not covered by § 523(a)(2)(A)'s predecessor. Pet.Br.22-24.[4]

Respondent fails to distinguish cases recognizing other forms of fraud. Resp.Br.24 n.2 & 49-50. Those cases hold that conduct is "fraud" notwithstanding the lack of any misrepresentation. *Supra* 7-8; *see, e.g.*, *Wallace v. Wallace*, 291 S.E.2d 386, 388 (W Va. 1982) (conveyance intended to defeat divorcing spouse's property interest); *Cox v. Hale*, 114 So. 465, 467 (Ala. 1927) (undue influence).

Respondent incorrectly suggests that some of these cases involve only fiduciary fraud. As in *Neal*, the defendant in *Seeberg v. Norville* was not a fiduciary, yet he was liable in fraud for purchasing property (*from* a fiduciary) for what he knew to be less than fair market value. 85 So. 505, 506-07 (Ala. 1920). And in *Smith v. Harrison*, only one of the defendants was a fiduciary, but they all participated in "fraud" when they obtained a favorable judgment by threatening the opposing party. 2 Heisk. 230, 235-37 (Tenn. 1870).

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[4] Interpreting § 523(a)(2)(A)'s predecessor, this Court recognized that "liabilities for obtaining property by false pretenses or false representations" are debts "obtained by fraud," but it never suggested that "false pretenses" and "false representations" are the only kinds of fraud. *Compare Gleason v. Thaw*, 236 U.S. 558, 562 (1915), *with* Resp.Br.8.

Nor can Respondent sidestep these authorities because fraud "typically" involves a misrepresentation. Resp.Br.22 (internal quotation marks omitted). The typical form of fraud is not the only form. *See* Pet.Br.20-32. Respondent dismisses cases setting forth a broad definition of fraud if the fraud at issue ultimately involved a misrepresentation. Resp.Br.24 & n.2. But in explaining the law, those cases recognize that common-law fraud encompasses more than misrepresentations. *See, e.g.*, *Stapleton v. Holt*, 250 P.2d 451, 445 (Okla. 1952); *Chien v. Chen*, 759 S.W.2d 484, 494-95 (Tex. App. 1988). And numerous cases *hold* the same thing. *See supra* 7-9.

Respondent notes that, however the common law may have understood fraud, the Uniform Law Commission in 2014 recommended renaming the Uniform Fraudulent Transfer Act to no longer refer to fraudulent transfers as "fraud." But as *Field* instructs, the relevant inquiry is "the concept of 'actual fraud' as it was understood in 1978." 516 U.S. at 70. The Commission's recommended change in 2014 only underscores the longstanding usage of actual fraud that Congress codified in 1978. Indeed, the Commission noted that deliberately fraudulent transfers were "widely known" as "actual fraud." Unif. Voidable Transactions Act § 15, cmt.1 (Unif. Law Comm'n 2014).

Finally, Respondent cites a 1902 House Judiciary Committee report to show that "the phrase 'false pretenses or false representations'" is "coterminous" with "created by fraud." Resp.Br.7 (citing H.R. Rep. No. 57-1698, at 6 (1902)). But that report was based on an earlier draft of the 1903 amendments, which

still included the 1898 Act's reference to "frauds." *See* H.R. 13679 (1902); *see also* 36 Cong. Rec. S1035 (daily ed. Jan. 21, 1903) (recording vote "to strike out 'frauds, or'" in § 523(a)(2)(A)'s predecessor). Thus, when the Committee stated that "claims created by fraud but not reduced to judgment" would be nondischargeable, H.R. Rep. No. 57-1698 at 6, it was characterizing draft statutory language that referred to "liabilities for *frauds*," H.R. 13679 (emphasis added). This report says nothing about the scope of the 1903 discharge bar that Congress actually enacted.

2. Section 523(a)(2)(A)'s predecessor did not apply to innocent or negligent misrepresentations

Respondent surmises that Congress added "or actual fraud" to address concerns that courts might interpret "false pretenses" and "false representation" to include innocent conduct. But before 1978, false pretenses and false representation already required *intentional* misrepresentation at common law, and courts universally interpreted § 523(a)(2)(A)'s predecessor accordingly. Congress did not add "or actual fraud" "just to state an already existing rule." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995); *see* Pet.Br.34-36.

Respondent's own sources confirm that, "[t]o be guilty of the crime of false pretenses, one must .... know that his representation is false" and "have an intent to defraud." LaFave, SUBSTANTIVE CRIMINAL LAW § 19.7(f). So, too, with false representation. Petitioner and Respondent agree that "false representation" refers to the common-law tort of

deceit. Indeed, Respondent derives the elements of false representation from a treatise's discussion of "deceit." Resp.Br.25 (citing Prosser, TORTS § 105, at 684 (4th ed. 1971); *id.* § 107 at 699). The same sections of that treatise make clear that deceit required a *knowingly* false representation *intended* to induce reliance. Prosser, *supra*, § 105 at 685-86; *id.* § 107 at 699-702; *see also* Restatement (Second) Torts § 526 & cmt.d.

To be sure, some courts recognized that "statements recklessly made and statements made as of knowledge, when in fact no such knowledge exists, are ... the equivalents of conscious misrepresentations." *Vincent v. Corbitt*, 47 So. 641, 642 (Miss. 1908); *see also* 23 Am. Jur. Fraud & Deceit § 127 (1939). But these cases do not eliminate the scienter requirement; rather, they hold that reckless disregard for the facts "is the full equivalent of knowledge." Prosser, *supra*, § 107 at 705 & n.23; *see also* Restatement (Second) § 526 cmt.d. Moreover, cases that impose liability for mere *innocent* misrepresentations make clear that such conduct is *not* actionable as deceit. *See, e.g., Brown v. Underwriters at Lloyd's*, 332 P.2d 228, 233 (Wash. 1958) (en banc); *Int'l Prods. Co. v. Erie R.R. Co.*, 155 N.E. 662, 663 (N.Y. 1927); *see also* Restatement (Second) Torts §§ 525, 552A-D (distinguishing between "Fraudulent Misrepresentation (Deceit)" and negligent or innocent misrepresentations).

Respondent cites stray language from a treatise that "'[a] minority of the American courts ... have held that deceit will lie for negligent statements.'" Resp.Br.31 (quoting Prosser, *supra*, § 107 at 705). But none of the cited cases supports that

characterization. Each imposes liability for reckless statements, which are "equivalent[] [to] conscious misrepresentations." *Vincent*, 47 So. at 642-43; *see Anderson v. Tway*, 143 F.2d 95, 99 (6th Cir. 1944); *Mullen v. E. Trust & Banking Co.*, 81 A. 948, 949-50 (Me. 1911); *Watson v. Jones*, 25 So. 678, 683 (Fla. 1899); *Schoefield Gear & Pulley Co. v. Schoefield*, 40 A. 1046, 1051 (Conn. 1898).

Accordingly, courts interpreting "false pretenses" and "false representation" under § 523(a)(2)(A)'s predecessor "unanimously require[d]" "fraudulent intent or reckless disregard for the truth tantamount to willful misrepresentation." *Wright v. Lubinko*, 515 F.2d 260, 263-64 (9th Cir. 1975).[5] This consensus is no surprise: From its earliest iterations, the discharge bar has consistently been construed to apply *only* to intentionally fraudulent conduct. *See Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1759-60 (2013); *Neal*, 95 U.S. at 709. That accords with the Code's longstanding policy of affording relief

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[5] *See, e.g.*, *Carini v. Matera*, 592 F.2d 378, 380 (7th Cir. 1979) (per curiam); *In re Matter of Vickers*, 577 F.2d 683, 687 (10th Cir. 1978); *Matter of McMillan*, 579 F.2d 289, 292 (3d Cir. 1978); *Ruegsegger v. McCarley*, 496 P.2d 214, 218 (Ore. 1972); *Peoples Fin. & Thrift Co. of Ogden v. Doman*, 497 P.2d 17, 19 (Utah 1972); *Swanson Petroleum Corp. v. Cumberland*, 167 N.W.2d 391, 397 (Neb. 1969); *Weigand v. Furniss*, 377 P.2d 371, 372 (Idaho 1962); *Zerega Distrib. Co. v. Gough*, 325 P.2d 894, 896 (Wash. 1958); *Horner v. Nerlinger*, 7 N.W.2d 281, 285-86 (Mich. 1943); *Slacum v. E. Shore Trust Co.*, 163 A. 119, 120 (Md. 1932); *Drake*, 128 N.W. at 319; *Sanitation Recycling, Inc. v. Jay Peak Lodging Ass'n, Inc.*, 428 F. Supp. 1022, 1024 (D. Vt. 1977); *In re Blessing*, 442 F. Supp. 68, 70 (S.D. Ind. 1977); *In re Blakesley*, 27 F. Supp. 980, 981 (W.D. Mo. 1939); *Hisey v. Lewis-Gale Hosp.*, 27 F. Supp. 20, 23 (W.D. Va. 1939).

to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

Against this backdrop, it is implausible that Congress added "or actual fraud" to narrow the fraud discharge bar, out of concern that § 523(a)(2)(A) might otherwise cover innocent conduct. There was no basis for concern.

3. Respondent's construction renders Congress's 1978 amendment superfluous

Finally, Respondent claims that his reading is necessary to give each statutory term meaning. But Respondent's reading does not give actual fraud any independent meaning; it merely restates the "already existing rule" that false pretenses and false representations require intent to defraud. *Stone*, 514 U.S. at 397; *see supra* 11 13. And when the choice is between depriving an amendment of *any* new meaning and giving it a meaning that both expands upon and overlaps with pre-existing statutory language, this Court repeatedly has done the latter.

In *Louisville & Nashville Railroad Co. v. Mottley*, for example, Congress added the words "or different" to a statute prohibiting common carriers from demanding or collecting compensation "greater or less" than the published tariffs. 219 U.S. 467, 475 (1911); *see also* Pet.Br.35. Congress's amendment overlapped with the pre-existing, preceding statutory phrases: Compensation "greater or less" than the published tariff is also "different." But the Court's animating concern was not to avoid overlap; it was to avoid rendering the amendment "superfluous or

meaningless." *Id.* at 475-76; *see also Pierce Cnty. v. Guillen*, 537 U.S. 129, 145 (2003).

Even outside the context of amendments, this Court does not defy grammar merely to avoid overlap. Congress often uses phrases that both overlap with and expand upon preceding terms, especially to ensure comprehensive coverage. For example, 28 U.S.C. § 2680(c) preserves sovereign immunity for claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer." *Ali* held that "any other law enforcement officer" means "law enforcement officers of whatever kind," including customs and excise officers. 552 U.S. at 220. That interpretation arguably rendered "any officer of customs or excise" superfluous. But, as the Court explained, "Congress may have simply intended to remove any doubt that officers of customs or excise were included in 'law enforcement officers.'" *Id.* at 226.

Thus, the possibility that, under Petitioner's reading, actual fraud overlaps with § 523(a)(2)(A)'s pre-existing terms does not justify Respondent's interpretation. Congress's belt-and-suspenders approach reflects its "inten[t] to remove any doubt" about the comprehensive scope of the fraud discharge bar. *Id.* By contrast, Respondent's interpretation has indefensible consequences: It deprives the 1978 amendment of any effect, defies grammar, and ignores the settled meaning of actual fraud that Congress codified.

II. SECTION 523(a)(2)(A)'S "OBTAINED BY" LANGUAGE DOES NOT REQUIRE A MISREPRESENTATION

Respondent makes much of § 523(a)(2)(A)'s requirement that a "debt ... for money [or] property [be] *obtained by*" actual fraud. From this language, he infers that § 523(a)(2)(A) applies only if the debtor obtains property directly from a creditor to whom he makes a reliance-inducing misrepresentation. In other words, he contends that § 523(a)(2)(A) excludes a transferee's debt for a fraudulent conveyance, because the discharge bar applies only to a fraudulent transaction directly between the debtor and the creditor. But "obtained by" does not impose any of these requirements.

1. The words "obtained by" require *causation*: The debtor must "acqui[re]" money or property *as a result of* fraud. *Cohen v. de la Cruz*, 523 U.S. 213, 218, 221 (1998); *see also Field*, 516 U.S. at 66 (describing "the element of causation inherent in the phrase 'obtained by'"). When a transferee receives property through a transfer that he knows is intended to defraud creditors, he commits actual fraud himself. He therefore obtains property fraudulently, i.e., by actual fraud (and that fraud also causes the creditor's loss).

To be sure, where fraud *does* involve misrepresentation, reliance is necessary to establish causation. But that is because a misrepresentation—unlike other frauds—does not cause any loss unless someone relies on it. *See* Restatement (Second) Torts § 546. It is not because "obtained by" invariably requires reliance. *See Field*, 516 U.S. at 68 n.7

("obtained by" does not "suppl[y]" an element of reliance).

2. Nor does the phrase "obtained by" require that the debtor *obtain* money or property *directly from* a creditor, or, where a misrepresentation is at issue, that it be made *directly to* the creditor. Section 523(a)(2)(A), in other words, is not limited to fraudulent transactions directly between a debtor and a creditor; it covers the full range of fraudulent conduct by which a debtor obtains money or property.

For example, *Myers v. International Trust Co.* interpreted the predecessor of § 523(a)(2)(A), which barred discharge of liabilities "'for obtaining property by false pretenses or false representations.'" 263 U.S. 64, 75 (1923) (discussing § 17a of the 1903 Act). By contrast, § 14b(3) (the predecessor of § 523(a)(2)(B)) barred discharge where a debtor had "'obtained property on credit from any person upon a materially false statement in writing *made to such person* for the purpose of obtaining such property on credit.'" *Id.* at 74 (emphasis added). *Myers* found it dispositive that, unlike § 14b(3), § 17a did not contain any "restriction as to whom [a] representation should be made." *Id.* at 75. Thus, the Court held that § 17a barred debts arising from misstatements made to a third party—not to the creditor. *Id.* at 75-76.

Other cases similarly refute Respondent's assertions that the debtor must "direct[] a false word or deed" at the creditor and "obtain something from the creditor." Resp.Br.35 (emphasis deleted). *In re Namenson* held that a debt for insurance money that the debtor obtained from a bank by forging the beneficiary's signature was nondischargeable under

§ 523(a)(2)(A)'s predecessor. 555 F.2d 1067, 1069 (1st Cir. 1977). The statute did not require that the creditor (the insurance beneficiary) rely on the misrepresentation, or that the debtor obtain money directly from the creditor. *Id.*

And when construing other language similar to § 523(a)(2)(A), this Court has repudiated constructions like Respondent's. *Loughrin* involved a provision penalizing schemes "'to *obtain* any [bank money or property] *by* means of false or fraudulent pretenses, representations, or promises.'" 134 S. Ct. at 2388 (quoting 18 U.S.C. § 1344(2)) (emphasis added). The defendant forged stolen checks, used them to purchase goods from Target, and then returned the goods for cash. *Id.* at 2387. In holding that this conduct violated the statute, *Loughrin* rejected the defendant's attempt to add an "invisible element" requiring that he make his representation to, and obtain property from, the bank rather than a third party. *Id.* at 2393.

Moreover, as these examples suggest, Respondent's interpretation of "obtained by" is not only unsupported by the statutory language; it would also leave § 523(a)(2)(A) powerless against many forms of fraud--even those in which a debtor obtains property by misrepresentations. Congress could not have intended that result. For instance, Respondent's construction of § 523(a)(2)(A) would allow a debtor who obtains an inheritance by forging a will to discharge his debt to the rightful heir because he neither obtained property from nor made a misrepresentation to that person. *See In re Freeland*, 360 B.R. 108, 122, 131 (Bankr. D. Md. 2006). A debtor who obtains property from third parties by

misrepresenting his identity could discharge any resulting debts to his victims. *See Kudelko v. Dalessio*, 829 N.Y.S.2d 839, 843 (N.Y.C. Civ. Ct. 2006). And, as Petitioner's *amici* explain, Respondent's interpretation would exclude the many Ponzi schemes where misrepresentations—and property—pass through numerous intermediaries instead of directly between the perpetrator and his victims. Bankr.Law.Prof.Am.Br.28-29.

3. Respondent insists that § 523(a)(2)(A) requires a transaction directly between the debtor and creditor because § 523(a)(2)'s *other* subsections impose such a requirement. Resp.Br.35. But nothing in § 523(a)(2)(C) requires obtaining money or property from the *creditor*. And § 523(a)(2)(B), which expressly requires that the debtor make a false statement to the creditor from whom he obtains property, only highlights the absence of similar language in § 523(a)(2)(A). *See Myers*, 263 U.S. at 75-76. Indeed, Congress's use of the word "obtain" elsewhere in the Code confirms that, when it wanted to specify "from whom," it did so. *See, e.g.*, 11 U.S.C. § 109(h)(3)(A) (discussing consequences of debtor's inability to "obtain" credit counseling services "from an approved nonprofit").

4. Finally, Respondent argues that the phrase "obtained by"—contained in § 523(a)(2)(A) but not in other discharge bars related to fraud—would be "meaningless" if it did not require obtaining something directly from a creditor. Resp.Br.34. Not so. A debtor might commit fraud without obtaining anything *from anyone* as a result—for example, by making a misrepresentation to induce someone to invest in his friend's company, Restatement (Second)

Torts § 533 cmt.d; by aiding and abetting another's fraud, *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000); or by making misrepresentations that lead to a victim's physical harm, Restatement (Second) Torts § 557A. In these situations, the "obtained by" language clarifies that § 523(a)(2)(A) does not bar discharge of the debt, because the debtor has not obtained money or property as a result of his fraud. Other provisions, by contrast, sweep more broadly, barring discharge of debts "for" fraud—regardless of profit. *See* 11 U.S.C. § 523(a)(4), (11), (19).

In sum, § 523(a)(2)(A) requires only that a debtor obtain money or property as a result of actual fraud. It does not require that the debtor obtain anything directly from a creditor, or make a reliance-inducing misrepresentation to the creditor. It therefore readily encompasses a debt for money or property that a debtor obtains by his knowing participation in a fraudulent transfer, i.e., by actual fraud.

III. INTERPRETING ACTUAL FRAUD ACCORDING TO ITS COMMON-LAW MEANING DOES NOT CREATE SUPERFLUITY

Respondent is also wrong that his reading is necessary to avoid impermissible overlap between § 523(a)(2)(A) and other Code provisions.

1. As an initial matter, Respondent's concerns about overlap are misplaced. Some degree of overlap within § 523(a) is inevitable because Congress used the same words in multiple provisions. For example, several provisions bar discharge on account of "fraud." 11 U.S.C. § 523(a)(2)(A), (4), (11), (19). And two of

them apparently overlap completely because they both involve "fraud or defalcation while acting in a fiduciary capacity." *Id.* § 523(a)(4), (11). Such overlap is unsurprising because Congress sought to make doubly sure that bankruptcy would not become an "engine of fraud and corruption." Pet.Br.43-46 (internal quotation marks omitted).

Thus, this Court has recognized that the same conduct may fall within different discharge bars. In *Cohen*, 523 U.S. at 223, the Court held that punitive damages arising from fraud are nondischargeable under § 523(a)(2)(A), even though *Grogan* had previously recognized that such damages may *also* "appropriately" be "governed by § 523(a)(6)," 498 U.S. at 282 n.2. And lower courts have likewise concluded that "[t]here is no indication" that Congress intended all of the provisions in § 523(a) "to be mutually exclusive." *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853, 857 (1st Cir. 1997); *see Matter of Towers*, 162 F.3d 952, 954 (7th Cir. 1998); *Matter of Stokes*, 995 F.2d 76, 76-77 (5th Cir. 1993) (per curiam). Indeed, when Congress wanted to make certain provisions within § 523(a) mutually exclusive, it said so. *See* 11 U.S.C. § 523(a)(15) (excluding debts "of the kind described in [§ 523(a)(5)]"); *id.* § 523(a)(3) (excluding "debt[s] of a kind specified in [§ 523(a)(2), (4), or (6)]"); *id.* § 523(a)(2)(A) (excluding "statement[s] respecting the debtor's or an insider's financial condition," which are otherwise covered by § 523(a)(2)(B)).

Potential overlap between § 523(a)(2)(A) and the provisions Respondent cites is thus no reason to deprive § 523(a)(2)(A) of its plain meaning.

2. In any event, interpreting actual fraud according to its common-law meaning would not render § 523(a)'s other references to fraud superfluous. As Respondent himself emphasizes, these other provisions, which bar discharge "for" fraud, do not require a debtor to have *obtained* anything as a result of his fraud. *Compare* 11 U.S.C. § 523(a)(2)(A), *with id.* § 523(a)(4), (11), (19).[6] Thus, these provisions could apply in numerous situations that § 523(a)(2)(A) would not. *See supra* 19-20.

Respondent also claims that interpreting actual fraud according to its common-law meaning would create impermissible overlap between § 523(a)(2)(A) and (a)(6). But these provisions, too, serve independent functions. Section 523(a)(6) extends to "intentional torts" that do not involve any type of "fraud" at all, such as assaulting someone or setting his car on fire. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998).

Whether § 523(a)(6) also encompasses the knowing receipt of a fraudulent transfer is hardly clear (and is not presented here). Citing only scant authority, and none from this Court, Respondent asserts that "[t]he level of intent required under § 523(a)(6) poses no obstacle" to applying that provision to fraudulent transfers. Resp.Br.44. But § 523(a)(6) requires both a "malicious" and "a deliberate or intentional injury." *Geiger*, 523 U.S. at 61 (emphasis deleted). By contrast, a participant in a fraudulent-transfer scheme commits actual fraud if he merely *knows* of

[6] These provisions also apply to more limited forms of fraud (e.g., fiduciary fraud, securities fraud) than § 523(a)(2)(A)'s "actual fraud" bar.

the transferor's fraudulent purpose; he need not "directly intend to delay or defraud creditors" himself. *Graham v. Furber*, 14 C.B. 410, 414, 418, 139 Eng. Rep. 169, 170-72 (K.B. 1854); *see* Pet.Br.30-32.[7]

Moreover, under Respondent's apparent understanding of § 523(a)(6) (Resp.Br.51, 53-54), virtually *any* conduct within § 523(a)(2)(A)—including an intentional misrepresentation that induces a creditor to give up property—would also constitute a "willful and malicious injury." This Court has cautioned against interpreting § 523(a)(6) so broadly as to swallow the other discharge bars. *Geiger*, 523 U.S. at 62. That is particularly true here. Chapter 13 debtors cannot discharge debts that fall within § 523(a)(2)(A)'s specific fraud provisions, but they generally can discharge debts that fall within § 523(a)(6). *See* 11 U.S.C. § 1328(a)(2). Shifting debts arising from fraud from § 523(a)(2)(A) to § 523(a)(6) would thwart Congress's determination—

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[7] Petitioner's failure to prevail on its § 523(a)(6) claim is not dispositive of its claim under § 523(a)(2)(A). *See* Resp.Br.53. First, Petitioner focused this litigation on § 523(a)(2)(A) rather than § 523(a)(6). Pet.App.96a (noting that "Husky's complaint makes a glancing reference to 11 U.S.C. § 523(a)(6)," which "is not enough to preserve a claim under this provision"); Pet.App.18a ("'no exhibits were introduced'" and "'no testimony was adduced'" regarding § 523(a)(6)). Second, whatever the lower courts' findings regarding § 523(a)(6), they have no bearing on § 523(a)(2)(A); if they did, the Fifth Circuit would not have had to consider whether § 523(a)(2)(A) requires a misrepresentation at all. Finally, whether Petitioner has proven the *facts* needed to satisfy § 523(a)(2)(A) under the proper legal standard is a question best decided by the courts below on remand, not by this Court in the first instance. Pet.Br.53-54.

even under Chapter 13—that "the interest in protecting victims of fraud" outweighs "the interest in giving perpetrators of fraud a fresh start," *Grogan*, 498 U.S. at 287; *see* Pet.Br.46, 52.

3. Finally, Respondent asserts that Petitioner's reading of § 523(a)(2)(A) contravenes §§ 727(a)(2) and 548(a)(1). *See* 11 U.S.C. § 727(a)(2) (barring discharge where debtor transfers property away from creditors); *id.* § 548(a)(1) (permitting trustee to avoid certain fraudulent transfers). But neither provision provides any recourse when the recipient of a fraudulent conveyance has dissipated the assets or otherwise refuses to turn them over, much less when that individual *himself* declares bankruptcy.[8] *See, e.g.*, *McClellan v. Cantrell*, 217 F.3d 890, 892 (7th Cir. 2000). Moreover, a creditor has no independent recourse under § 548(a)(1), which can be invoked only by the trustee of a transferor's bankrupt estate. Accordingly, far from conflicting with §§ 727(a)(2) or 548(a)(1), § 523(a)(2)(A) complements them by providing another means of ensuring that victims of fraud are made "whole." *Cohen*, 523 U.S. at 222.

CONCLUSION

The judgment below should be reversed, and the case should be remanded for further proceedings.

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[8] Respondent agrees that § 727(a)(2) does not apply to recipients, Resp.Br.42, and his *amici*'s contrary suggestion lacks any basis, *see* Prof.Am.Br.17-18.

Respectfully submitted,

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